Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-638

LOWENE R. CLEMENTE,

Petitioner,

vs.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Attorneys for Petitioner

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TABLE OF CONTENTS

	Page
REPLY BRIEF OF PETITIONER	1
CERTIFICATE OF SERVICE BY MAIL	5

TABLE OF AUTHORITIES

Case	Page
Fitzgerald v. Hampton 467 F.2d 755 (D.C. Cir. 1972)	2,3,4
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	3
Owen v. City of Independence, Missouri, 445 U.S. 622 (1980)	3,4

Contrary to the assertions of the opposition to the Petition for Writ of Certiorari, this is not a simple case involving the incorrect processing of an employment discrimination claim.

Four administrative claims were asserted by petitioner Clemente to respondent Air Force. The responsible officials of the Air Force refused to process three of the four administrative claims, but did process the discrimination claim. Petitioner Clemente asserts that a Bivens recovery is appropriate. Otherwise, federal agencies can affect, even terminate, civil service employees with impunity and can flaunt injunctive orders of a federal district court, all as has occurred in this case.

Through a reduction-in-force ("RIF"), respondent Air Force removed petitioner from her civil service position and permanently down-graded her civil service

grade. Four administrative claims were asserted . . .

1. RIF action was improper, not in good faith, for personal reasons, and was really a disciplinary measure.

2. RIF action was discriminatory.

3. There was a denial of RIF priority selection and RIF priority referral rights.

4. There was retaliation and reprisal because of the filing of the initial three claims.

Today, after over eight years, three of the four claims remain unresolved in spite of Air Force and Civil Service regulations requiring administrative processing. Mrs. Clemente has not had any administrative processing or hearings as were afforded to A. Ernest Fitzgerald in Fitzgerald v. Hampton 467 F.2d 755 (D.C.

Cir. 1972) (in banc) [1] nor damages as this Court directed in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980).

Thus, the issues posed in the Petition for Writ of Certiorari center around whether federal agencies can down-grade civil servants without affording regulatory administrative processing and whether federal agencies can deliberately flaunt the authority of a federal court without concern for the serious consequences of their actions.

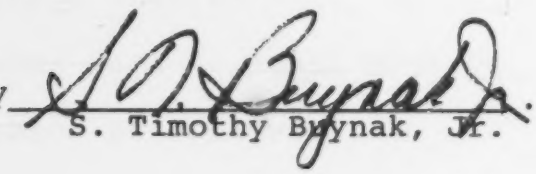
1/ The court of appeals' decision conflicts with Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). The Fitzgerald court found that the "statutory employment rights of Fitzgerald (were) within the liberty and property concepts of the Fifth Amendment," 467 F.2d at 762. See also Footnote 15, Nixon v. Fitzgerald, 457 U.S. 731 (1982). The underlying court of appeals' decision holds that petitioner Clemente has no property or liberty interests in her employment or career. Appendix A., pp. 23-24.

Based upon the significant issues presented herein and the conflict of the underlying court of appeals' decision with Fitzgerald v. Hampton, supra, and Owen v. City of Independence, Missouri, supra, the Petition for a Writ of Certiorari should be granted.

Dated: January 15, 1986

Respectfully submitted,

HATCH AND PARENT

By 
S. Timothy Bynak, Jr.

CERTIFICATE OF SERVICE BY MAIL

I, S. Timothy Buynak, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Lowene R. Clemente, petitioner herein, hereby certify that on January 15, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Reply Brief on each of the parties herein by placing a three copies thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Barbara, California, addressed as follows:

Solicitor General
Department of Justice,
Washington, D.C. 20530

Edward R. Cohen
United States Department of Justice
Room 3127
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Washington, D.C. 20530

All parties required to be served have been served.

Dated: January 15, 1986

S. Timothy Buyrak, Jr.

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